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A

Arumugam a/l Shanmugam v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–70–03 OF 2013
LINTON ALBERT, MAH WENG KWAI AND ABANG ISKANDAR JJCA
3 JULY 2014

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused charged for murder — Accused convicted and sentenced to death — Accused denied being present at material time — Defence of alibi — Oral evidence that accused was at uncle's house — Trial judge dismissed defence — Whether trial judge correct — Whether alibi ought to be admitted as evidence — Penal Code s 302

D

The appellant was charged for murder, an offence under s 302 of the Penal Code together with four others still at large. The deceased was allegedly attacked with sharp 'parangs'. The sole eyewitness, Sundaresan ('PW7') testified that he saw the group, including the appellant, assaulting the deceased. The appellant denied being present at the material time and place and that he had assaulted the deceased and further claimed that he was at his uncle's ('DW2') house. The appellant had in his oral evidence stated that he was in his uncle's house at No 1022 at the material time, whereas the uncle's house number was 1025. The appellant was in fact arrested at house No 1025. Significantly, the prosecution did not challenge the appellant that he was in fact arrested in house No 1025 and not in house No 1022 and accordingly, his evidence was held as incorrect or unreliable and was not credible. The trial judge rejected the defence of alibi and held that the defence could not be accepted as it was not possible for DW2's house to have two addresses. The trial judge proceeded to convict the appellant and sentenced him to death. Being dissatisfied with the order of conviction and sentence, the appellant appealed against the said order.

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Held, allowing the appeal and acquitting and discharging the appellant:

(1) The trial judge failed to correctly evaluate and appreciate the evidence of the appellant and DW2 who had testified that there were in fact two houses in question and not just one. The trial judge, by summarily dismissing the defence of alibi based merely on the incorrect address stated was with respect, wrong in doing so. The trial judge did not address his mind on the location of the two houses which were adjacent to each other and linked by a common door way. This omission was a serious misdirection by way of non-direction which had occasioned a miscarriage of justice (see para 19(a)).

I

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(2) Upon a closer scrutiny of the evidence of PW7, the court found that he was not in the final analysis a reliable and credible witness. To begin with, one would have thought that PW7, having just undergone a harrowing experience himself of being threatened with a *parang* by the appellant would have blurted out their names to the first police officer he met. This would be especially so since PW7 said that he saw the group of persons attacking the deceased mercilessly with *parang* and that the appellant was known to him (see para 19(b)).

(3) PW7 did not at any time lodge a police report accusing the appellant of the assault on the deceased and the threat to his own life with a dangerous weapon. While there was no requirement for corroborative evidence to be adduced in a murder case by way of a police report by PW7, a police report would have been strong supportive evidence of PW7's conduct (see para 19(b)).

(4) Given that PW7 had failed to name the appellant to the police at the earliest opportunity and that there was no proper explanation proffered for such a failure and in light of the erroneous evaluation of the alibi defence by the trial judge, it would be unsafe to maintain the conviction and sentence. With the several loose ends, the available evidence did not point irresistibly to the appellant's guilt. Where there were two possible inferences, the inference more favourable to the appellant should be drawn. The unsatisfactory features in the trial of the appellant showed that the case against him fell short of proof beyond reasonable doubt. The defence of alibi of the appellant was corroborated by DW2 although in law the alibi need not be corroborated by independent evidence in order to raise a defence (see para 20).

[Bahasa Malaysia summary

Perayu dituduh membunuh, kesalahan di bawah s 302 Kanun Keseksaan bersama empat orang yang lain yang masih bebas. Si mati didakwa menyerang dengan parang tajam. Satu-satunya saksi, Sundaresan ('PW7') memberi keterangan bahawa dia melihat kumpulan tersebut, termasuk perayu, menyerang si mati. Perayu menafikan berada pada masa material dan tempat dan dia menyerang si mati dan selanjutnya mendakwa yang dia berada di rumah pakciknya ('DW2'). Perayu telah dalam keterangan lisannya menyatakan bahawa dia berada di rumah pakciknya di No 1022 pada masa material, sebaliknya nombor rumah pakciknya adalah 1025. Perayu sebenarnya ditangkap di rumah No 1025. Nyata sekali, pihak pendakwaan tidak mencabar perayu bahawa dia sebenarnya ditangkap di rumah No 1025 dan bukan No 1022 dan oleh itu, keterangannya diputuskan sebagai tidak betul atau tidak boleh dipercayai dan tidak kredibel. Hakim perbicaraan menolak pembelaan alibi dan memutuskan bahawa pembelaan tidak boleh diterima kerana adalah tidak mungkin untuk rumah DW2 mempunyai dua alamat. Hakim perbicaraan meneruskan untuk menyabitkan perayu dan

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menjatuhkan hukuman mati. Tidak berpuas hati dengan perintah sabitan dan hukuman, perayu merayu terhadap perintah tersebut.

Diputuskan, membenarkan rayuan dan melepaskan dan membebaskan perayu:

(1) Hakim perbicaraan gagal untuk menilai dengan betul dan menerima keterangan perayu dan DW2 yang memberi keterangan bahawa memang sebenarnya terdapat dua rumah dan bukan hanya satu. Hakim perbicaraan, terus menolak pembelaan alibi hanya berdasarkan alamat yang salah dinyatakan adalah dengan hormatnya, salah dalam berbuat demikian. Hakim perbicaraan tidak mengarahkan mindanya ke atas lokasi kedua-dua rumah yang bersebelahan dan dihubungkan dengan dua pintu biasa. Peninggalan ini adalah salah arah serius dengan cara yang tidak berarah yang menyebabkan ketidakadilan (lihat perenggan 19(a)).

(2) Atas penelitian yang mendalam terhadap keterangan PW7, mahkamah mendapati dalam analisis muktamad bahawa dia bukan saksi yang boleh dipercayai. Pertamanya, seseorang akan terfikir bahawa PW7, yang baru mengalami pengalaman yang mengganggu perasaan diancam dengan parang oleh perayu akan dengan tiba-tiba memberitahu nama-nama mereka kepada polis pertama yang ditemuinya. Ini akan terjadi memandangkan PW7 menyatakan yang dia melihat sekumpulan orang menyerang si mati tanpa belas kasihan dengan parang dan bahawa perayu adalah orang dikenalinya (lihat perenggan 19(b)).

(3) PW7 tidak pada bila-bila masa membuat laporan polis mendakwa perayu menyerang si mati dan mengancamnya dengan senjata berbahaya. Sementara tiada keperluan untuk keterangan sokongan untuk dikemukakan dalam kes pembunuhan melalui laporan polis oleh PW7, laporan polis akan menjadi keterangan sokongan yang kukuh terhadap kelakuan PW7 (lihat perenggan 19(b)).

(4) Mengambil kira PW7 gagal memberi nama perayu kepada polis pada peluang terawal dan tidak terdapat penjelasan wajar diberikan untuk kegagalan sedemikian dan berdasarkan penilaian salah terhadap pembelaan alibi oleh hakim perbicaraan, adalah tidak selamat untuk mengekalkan sabitan dan hukuman. Dengan keterangan yang tidak kukuh, keterangan yang ada tidak menunjukkan kepada kebersalahan perayu. Di mana terdapat dua inferens kemungkinan, inferens yang lebih memihak perayu patut dibangkitkan. Ciri-ciri yang tidak memuaskan dalam perbicaraan perayu menunjukkan bahawa kes terhadapnya tidak mempunyai bukti melampaui keraguan munasabah. Pembelaan alibi perayu adalah disokong oleh DW2 walaupun dari segi undang-undang alibi tersebut tidak perlu disokong oleh keterangan tak bersandar untuk membangkitkan pembelaan (lihat perenggan 20).]

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Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Abdul Aziz bin Lela v PP [2011] 5 MLJ 750, CA (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (refd)
KS Roberts v PP [1970] 2 MLJ 137 (refd)
Killick v R (1981) 147 CLR 565, HC (refd)
Liow Siow Long v PP [1970] 1 MLJ 40; [1969] 1 LNS 86 (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mutachi Stephen v Uganda [2003] UGCA 9, CA (refd)
R v Lizotte [1951] SCR 115, SC (refd)
S v Liebenberg 2005 (2) SACR 355, CA (refd)
Vasan Singh v PP [1988] 3 MLJ 412; [1989] 1 CLJ (Rep) 166, SC (distd)

Legislation referred to

Criminal Procedure Code s 402A
Evidence Act 1950 s 114(g)
Penal Code ss 34, 302

Appeal from: Criminal Trial No 45–6–03 of 2012 (High Court, Pulau Pinang)

RSN Rayer (Leonard Raj with him) (R Nethaji Rayer & Co) for the appellant.
Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

THE PROSECUTION'S CASE

[1] The appellant was charged with an offence of murder punishable under s 302 of the Penal Code of having caused the death of one Vijaindran a/l Sivanathan ('the deceased') together with four others still at large on 4 June 2011 at about 11.30pm along the five-foot way in front of shop Nos 24 & 26, Jalan Tasek SS/1, Bandar Tasek Mutiara, Simpang Ampat, Seberang Perai Selatan, Penang.

[2] The appellant was charged with having committed the offence with common intention as defined under s 34 of the Penal Code, with the four others known only as Sasi, Kuthai, Sathia and Ghajini.

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[3] The cause of death of the deceased was due to severe loss of blood (haemorrhaging) from the many slash wounds suffered by the deceased.

[4] It was the prosecution's case that the deceased was attacked by the appellant and the four others with sharp 'parangs'.

[5] The sole eye-witness, Sundaresan a/l Muniandy ('PW7') testified that he saw the group of five persons, including the appellant assault the deceased, although no details were given as to how the appellant had assaulted the deceased.

[6] PW7 also testified that at a point in time during the assault the appellant and Sathia had placed a *parang* against his neck but did not cause him any injury.

AT CLOSE OF PROSECUTION'S CASE

[7] At the close of the prosecution's case, the learned trial judge held that the prosecution had established a prima facie case as per the charge against the appellant and ordered the appellant to enter into his defence.

THE DEFENCE

[8] The appellant denied being present at the material time and place and having assaulted the deceased.

[9] The appellant claimed that at the material time, on 4 June 2011 at about 11.30pm he was lying down on the sofa in his uncle's house at No 1025, Jalan Tasek, Simpang Ampat, Penang.

[10] Before the commencement of trial the appellant had given notice of his alibi dated 18 July 2012 to the prosecution as required under s 402A of the Criminal Procedure Code. In the notice of alibi, the appellant had stated that he was at home in his uncle's home at No 1022, Jalan Tasek, Simpang Ampat, Penang.

[11] The appellant elected to give sworn evidence. The appellant's uncle Ramalingam a/l Sadayan ('DW2') testified in support of the appellant's alibi defence.

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AT CLOSE OF THE DEFENCE

[12] The learned trial judge rejected the defence of alibi. In the main the learned trial judge held that the defence could not be accepted as it was not possible for DW2's house to have two addresses.

[13] The learned trial judge proceeded to convict the appellant and sentenced him to death.

THE APPELLANT'S APPEAL

[14] Being dissatisfied with the order of conviction and sentence, the appellant appealed against the said order.

DECISION OF THE COURT OF APPEAL

[15] Upon reading the *rekod rayuan* and the written submissions of learned counsel for the appellant and the learned deputy public prosecutor and upon hearing the oral submissions of counsel and the deputy public prosecutor aforesaid, the court unanimously decided to allow the appeal and ordered that the appellant be acquitted and discharged of the charge.

THE PROSECUTION'S APPEAL

[16] Being dissatisfied with the order of acquittal and discharge, the prosecution has now appealed against the said order to the Federal Court.

GROUNDS OF DECISION

[17] We are of the view that the learned trial judge had properly evaluated the evidence at the close of the prosecution's case and had correctly held that the prosecution had managed to establish a prima facie case of murder against the appellant.

[18] However, we are of the considered view that the learned trial judge fell into grave error of fact and law when he decided to reject the defence of alibi.

[19] We say so for the following reasons:

(a) in his grounds of judgment the learned trial judge, at *rekod rayuan Jilid* 1 p 23 para B, held that 'OKT mengatakan dia berada di rumah bapa saudaranya yang beralamat No. 1022 Kampung Rambutan, Simpang Ampat, Tasek pada 4.6.2011, jam lebih kurang 11.00 malam. Sementara itu, SD2 pula berkata semasa dia pulang ke rumahnya No. 1025, Jalan Tasek Simpang Ampat, Pulau Pinang pada 4.6.2011, jam

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lebih kurang 11.30 malam, dia melihat OKT sedang tidur di atas sofa di rumahnya. Jelas sekali terdapat perbezaan rumah di mana OKT berada iaitu rumah No. 1022 dan rumah No. 1025. SD2 cuba memberi penjelasan bahawa rumah No. 1025 dan rumah No. 1022 adalah rumah yang sama yang berkedudukan dalam jarang 2 hingga 3 kaki dan terdapat pintu yang boleh keluar masuk antara rumah-rumah tersebut, tidak boleh diterima dan dipercayai. Tidak mungkin sebuah rumah mempunyai dua nombor rumah berasingan iaitu rumah No 1022 and rumah No 1025. Ini menunjukkan pembelaan alibi OKT adalah tidak jitu.'

The appellant had in his oral evidence stated that he was in his uncle's house at No 1022 at the material time, whereas the uncle's house No is 1025. The appellant was in fact arrested at house No 1025 on 5 June 2011 at 2.45am by Insp Mohamad Zainal bin Buang ('PW4'). The appellant in his testimony stated that on 4 June 2011 at about 11.20pm he was together with his uncle DW2, in house No 1022. Significantly, it will be noted that the prosecution did not challenge the appellant during cross-examination that he was in fact arrested in house No 1025 and not in house No 1022 and accordingly his evidence was incorrect or unreliable and was not credible. The prosecution seemed to have accepted the appellant's evidence that he was arrested in house No 1022 when it knew full well that according to the evidence of PW4, the arresting officer, that the appellant was arrested in house No 1025.

It was only when DW2 was called to give evidence that it was confirmed by him that the appellant was arrested at his house which was house No 1025. What seemed to be a serious and material contradiction was explained by DW2 when he informed the court that there are actually two houses in question, one bearing No 1022 and the other bearing No 1025. DW2 further explained that house No 1022 belonged to his brother-in-law and was located only about two to three feet from his house. DW2 in his re-examination said that houses No 1022 and 1025 were connected by a common door. Thus it can be seen that while the appellant may have stated an incorrect address, the fact remained that his evidence was not seriously challenged when he said he was at home at the material time with his uncle DW2. The essence of the defence of alibi of the appellant was premised on the fact that the appellant was at home with his uncle. The address of the house was secondary. Quite obviously the appellant had got the addresses mixed up but this did not materially impugn his defence of alibi as DW2 had categorically confirmed that the appellant was with him in his house at the material time.

The caution statement of the appellant was tendered in evidence as exh D33. A reading of the statement will show that the appellant had stated

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that he was at home with DW2 at the time of the assault. No address was given by the appellant in his caution statement. A

The court notes that it was not as though the appellant had given one address in his caution statement and had later stated another address in his oral evidence, in which case the appellant can be accused of being inconsistent and contradictory in his evidence. B

The court was not in a position to verify the address stated by the appellant in his notice of alibi as the said notice was not produced in court as evidence. But from the record, it is apparent that the prosecution did not cross-examine the appellant on the issue of address stated in the notice of alibi, if any. In fact as far as the prosecution was concerned, the address of DW2's house did not seem to be an issue of concern during the cross-examination of the appellant. C

Respectfully, we are of the view that the learned trial judge failed to correctly evaluate and appreciate the evidence of the appellant and DW2 who had testified that there are in fact two houses in question and not just one. The learned trial judge by summarily dismissing the defence of alibi based merely on the incorrect address stated was with respect, wrong in doing so. The learned trial judge did not address his mind on the location of the two houses which are adjacent to each other and linked by a common door way. This omission was a serious misdirection by way of non-direction which had occasioned a miscarriage of justice (see *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 (FC) and *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 86 (HC)). D E F

What was of importance was the evidence of DW2 confirming the presence of the appellant at his house on 4 June 2011 at about 11.30pm notwithstanding that the appellant had stated the incorrect address in his evidence. The appellant's defence was one of alibi. The prosecution had failed to adduce any credible evidence of rebuttal or seriously challenge it on cross-examination. The appellant's defence was thus credible or had at least raised a reasonable doubt on the prosecution's case (see *Magendran a/l Mohan v Public Prosecutor*). On the facts, we are of the view that the appellant was in DW2's house at the material time lying down on the sofa. This evidence was affirmed by DW2 and there was no reason to disbelieve DW2. Accordingly this was acceptable evidence of an alibi and not a mere or bare denial by the appellant (the case of *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; [1989] 1 CLJ (Rep) 166 (SC) distinguished). G H I

Once details of the alibi had been disclosed in the notice of alibi before the trial in compliance with s 402A of the Criminal Procedure Code, the prosecution would have the opportunity of giving evidence to rebut it.

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Although an alibi is not uncommonly referred to as a defence, no onus of proving an alibi rests on the accused. The prosecution must negative an alibi if one is put forward by the accused (see *Killick v R* (1981) 147 CLR 565, High Court of Australia). It is trite that once an accused person pleads an alibi defence he does not assume the burden to prove it is true. The onus is on the prosecution to prove by evidence that the alibi is false and to prove that the accused was at the scene of crime (see *Mutachi Stephen v Uganda* [2003] UGCA 9). The evidence of an alibi need only raise a reasonable doubt that he committed the crime (see *R v Lizotte* [1951] SCR 115).

(b) the proper approach in this case was to compare and consider the evidence of the sole eye-witness PW7, who had said that he not only saw the appellant jointly assaulting the deceased with *parang* but that the appellant himself together with Sathia had placed a *parang* against his neck, with the alibi evidence of the appellant . The court had to be very cautious in evaluating the evidence of PW7 to determine whether PW7 was a credible and reliable witness.

On the importance of the necessary proof of identification required against an accused person before it can be relied upon by the court, Azlan Shah J (as His Highness then was) in *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137 at p 138 had this to say:

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word proved given in s. 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

And in *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49 at p 74; [2013] 9 CLJ 692 at p 722 (FC), Richard Malanjum CJ (Sabah and Sarawak) delivering the judgment of the Court when elaborating on the legal principles on the defence of alibi held that 'the correct approach is to consider the alibi in the light of all the evidence in the case and the Court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true. It would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected.'

His Lordship went on to say that 'once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it

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on the basis that the prosecution had placed before it strong evidence linking the appellant to the offence. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false, (see *S v Liebenberg* 2005 (2) SACR 355 (SCA)).'

Upon a closer scrutiny of the evidence of PW7, we find that he was not in the final analysis a reliable and credible witness. To begin with, one would have thought that PW7, having just undergone a harrowing experience himself of being threatened with a parang by the appellant and Sathia, would have blurted out their names to the first police officer he met. This would be especially so since PW7 said that he saw the group of persons attacking the deceased mercilessly with *parang* and that the appellant was known to him.

However, it will be noted that PW7 did not mention the appellant's name at all to DPC Yoges who was the first police officer whom PW7 met soon after the incident. The prosecution in their discretion decided not to call DPC Yoges as a witness and neither was he offered to the defence. The prosecution failed to explain to the court why DPC Yoges was not called or available to testify as a witness.

Further, when the investigating officer, ASP Govindarajan a/l Narayanasamy ('PW11') gave his evidence, he had informed the court that PW7 did not mention the appellant's name to him although PW7 had testified that he had informed PW11 of the appellant's name. The difference in evidence on this material point was a glaring and serious contradiction.

We are of the view that PW7's failure to mention the appellant's name as being one of the five persons present during the assault on the deceased, at the earliest opportunity to the police officers inevitably left a serious doubt in our minds as to whether the appellant was in fact present at the material time. The failure by PW7 to do so was not conduct reasonably consistent with that of an important eye-witness. To say the least, the silence was deafening.

It will also be noted that PW7 did not at any time lodge a police report accusing the appellant of the assault on the deceased and the threat to his own life with a dangerous weapon. While we are mindful that in law there is no requirement for corroborative evidence to be adduced in a murder case by way of a police report by PW7 we are however of the view that a police report would have been strong supportive evidence of PW7's conduct.

(c) the investigation officer, PW11, in his cross-examination (see *rekod rayuan* p 95) said that 'saya telah merampas pakaian OKT yang

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mempunyai kesan darah' in the course of his investigations. Yet no clothing belonging to the appellant was produced as exhibits in evidence. There was no explanation from PW11 as to what became of the clothing or whether they had been sent to the chemist for analysis. In the absence of any evidence on the whereabouts of the alleged blood stained clothing recovered from the appellant or the existence of a chemist report on the clothing if any, surely this would have been an appropriate case for the learned trial judge to invoke the presumption of unfavourable evidence under s 114(g) of the Evidence Act 1950 against the prosecution. It was the defence case that no clothing belonging to the appellant had been seized by the police. The absence of an explanation by PW11 created much doubt about the alleged blood stained clothing (see *Abdul Aziz bin Lela v Public Prosecutor* [2011] 5 MLJ 750 (CA) on the lack of evidence on the marking of a spanner as an exhibit);

(d) apart from the purported evidence of PW7 that the appellant was present during the assault, there was no other evidence produced to link the appellant with the crime scene. Most certainly, there was no forensic evidence to prove that the appellant was indeed present at the scene of the crime. A *parang* sent to the chemist for analysis was found to be without any blood stains and no DNA profile could be developed from the swab taken of the hilt of the *parang* (see *rekod rayuan* p 232).

CONCLUSION

[20] Given that PW7 had failed to name the appellant to the police at the earliest opportunity and that there was no proper explanation proferred for such a failure and in light of the erroneous evaluation of the alibi defence by the learned trial judge, we are of the view that it would be unsafe to maintain the conviction and sentence. With the several loose ends, the available evidence did not point irresistibly to the appellant's guilt. Where there are two possible inferences, the inference more favourable to the appellant should be drawn. The unsatisfactory features in the trial of the appellant showed that the case against him fell short of proof beyond reasonable doubt. The defence of alibi of the appellant was corroborated by DW2 although in law the alibi need not be corroborated by independent evidence in order to raise a defence.

[21] In the result, the appeal was allowed and the conviction and sentence set aside.

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Appeal allowed and appellant acquitted and discharged.

Reported by Afiq Mohamad Noor